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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 835.

MRS. ODILE V. HUBERT TUCKER, AS A STOCKHOLDER OF CRESCENT CITY LAUNDRIES, INC., ETC.,

Petitioner,

versus

NATIONAL LINEN SERVICE CORPORATION, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONER.

The numerous straw issues set up by the respondents, as shown by their briefs here, were also set up in the Court below. That court was misled into the error of accepting as true the misrepresentations made by respondents as to (1) the facts alleged in the complaint, (2) the history of prior litigation, and (3) the nature of this action.

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, (cited at p. 12 of Brief for National Linen Service Corp., et al.) does not constrain this Court to deny certiorari in a case where a court of appeals misreads a complaint. That case deals with a finding of fact by the court based upon conflicting evidence. This case deals with the false assumption of the existence of facts by the court which are clearly in opposition to the true facts shown by the unimpeachable written record—the Complaint.

THIS COURT HAS NEVER BEFORE CONSIDERED CRESCENT'S RIGHTS.

What the written record shows in this case has been passed upon only by the court below in the *one* instance of which complaint is here made. Petitioner contends that the complaint alleges that the fraud was concealed from Crescent until December 1941, while the court below stated that the complaint shows no concealment.

FRAUD CONCEALED FROM CRESCENT.

Neither the court below nor the respondents have been able to point to anything in the record in this case or elsewhere showing that any knowledge whatever was acquired by Crescent prior to December 3, 1941 with respect to the issuance of Voting Trust Certificates for the 4,187 shares to B. C. McClellan, or with respect to

the issuance of the Voting Trust Certificates aggregating 50,000 shares to S. W. Souers and his nominees, including McClellan, Leftwich, W. Irving Moss, Carmelo D'Antoni, Kohler, Sawyer and Hubert, directors of Crescent, Mike Moss, Assistant Secretary of Crescent, and Herbert J. Haas, Attorney for Crescent, or with respect to the transfer of some of the certificates received by McClellan to Fauss and Martin, directors of National, pursuant to the alleged conspiracy.

CRESCENT'S CLAIM TO STOCK NEVER REACHED ON MERITS.

The Claim, as stated in the Complaint, that Crescent became and has remained the lawful owner of many shares of the common stock of National Linen Service Corporation, in excess of the 23,548 shares which Crescent received in 1928, has never been heard on its merits.

THE KOHLER CASE.

During the time when the *Kohler* case was proceeding as a stockholders' derivative action, the court below held that the district court could not adjudicate said claim, because of the absence of an indispensable party, New Orleans Laundries, Inc. *Kohler v. McClellan* (C. A. 5) 156 F. (2) 908, 910.

The *Kohler* case later ceased to be a stockholders' derivative action, and reached a trial on the merits as a suit between Kohler, on behalf of himself and other stockholders of Crescent, individually, against only the personal representatives of B. C. McClellan. The sole issue tried was whether the 1942 Sheriff's sale constituted the commission of a tort by McClellan upon the stockholders of Crescent, as individuals. Since the *Kohler* case had then ceased to be an action on behalf of Crescent, Crescent's rights were not involved and could not have been adjudicated. *Kohler v. McClellan,* (D. C. E. D. La.) 77 F. Supp. 308; *Kohler v. Humphrey,* 174 F. (2) 946.

None of the Respondents here were parties to the *Kohler* case, either while it was a stockholders' derivative action, or afterward. All of them (except Southern) are charged in the complaint here with having conspired with McClellan to defraud Crescent of the stock claimed, and to conceal the fraud. The said respondents and McClellan were joint *tort feasors* acting in concert to commit the wrong. Regardless of the nature of the judgment in the *Kohler* case, it is no answer to the charges made against the respondents in this case. *Bigelow v. Old Dominion C. Min. & S. Co.,* 225 U. S. 111.

THE FIRST TUCKER CASE.

The dismissal of the first *Tucker* case was affirmed by the court below *solely* upon the ground of lack of diversity jurisdiction. The merits of the claims stated

were not reached and hence were not passed upon. *Tucker v. National Linen Service Corporation,* (C. A. 5) 188 F. (2) 265.

The first *Tucker* case challenged the validity of the agreement of July 27, 1928, "Exhibit C", under which respondents contend that Souers and his nominees were entitled to receive 50,000 shares of the stock here claimed. Said agreement was attacked in that case upon the ground that it was fraudulent and void, for many legal reasons. The first *Tucker* case also challenged the legality of the Sheriff's sale of 1942 upon the ground of fraud. All parties who were indispensable to a trial of those issues were named as parties defendant, but when the court held that diversity jurisdiction was lacking in the case, petitioner brought three other actions.

PENDING ACTIONS.

We filed two actions in a state court in Louisiana, where we could get service on Crescent's agent for service of process, against the Louisiana joint *tort feasors.* One of these actions is based upon the 1928 transaction here sued upon, and the other is based upon our former claim in the first *Tucker* case that the Sheriff's sale of 1942 was a fraud upon Crescent. We also filed this case against respondents in the district court in Georgia at the situs of National's stock and served Crescent under the provisions of *Section 1695, Title 28, U. S. C.*

PATENT MISSTATEMENTS OF FACTS BY COURT BELOW.

The briefs of respondents do not deny petitioner's assertion that the court below made the patent misstatements of the facts shown by the complaint, as specified in the petition, nor do they deny that the decision of the court below was based upon such misstatements.

NO INDISPENSABLE PARTIES ARE ABSENT.

Respondents deliberately avoid any mention of the cases of *St. Romes v. Levee Cotton-Press Co.*, 127 U. S. 614 and *MacKenzie & Englehard Co.*, 266 U. S. 131. They can find no answer to the positive and unequivocal holding in those cases which entitles Crescent to call upon National to replace its stock or pay its value, without pursuing persons who hold certificates for shares of said stock. There are no indispensable parties who are required to be before the court in this case, other than those present, to authorize the court to grant the decree sought against National.

LIMITATIONS.

Anticipating that this Court might find that the complaint shows that the fraud was concealed from Crescent until December 3, 1941, the brief for respondents National Linen Service Corporation, et al., (Page 11)

urges that the complaint does not allege actual fraud involving moral turpitude, such as is required to toll the statute of limitation until the discovery of the fraud, and cites as authority the case of *Middleton v. Pruden*, 57 Ga. App. 555.

The respondent trustees were under a fiduciary duty to Crescent to faithfully protect Crescent's interest in the shares of stock beneficially owned by said corporation, and to disclose to Crescent the facts pertaining to the unlawful acquisition by directors of Crescent in breach of their fiduciary duties, of shares of its stock as secret profits for themselves. The unlawful agreement between said respondent trustees and said directors to conceal said facts from Crescent, and their execution of said agreement by concealing said facts for 13 years, constituted actual fraud involving moral turpitude so as to have tolled the statute of limitations of Georgia until discovery of the fraud in 1941, under the full bench decision of the Supreme Court of Georgia in *Morris v. Johnstone*, 172 Ga. 598, 605.

Furthermore, under the federal rule, the statute of limitations was tolled until the discovery of the fraud.

In *Bailey v. Glover*, 21 Wall. (U. S.) 343, 348, 22 L. Ed. 636, 638, this Court said:

> "To hold that by concealing a fraud, or by committing a fraud in a manner that concealed itself until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent

fraud, the means by which it is made successful and secure."

And, in *Holmberg v. Armbrecht,* 327 U. S. 392, 396, 397, this Court said:

> "If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> "Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run *until the discovery of the fraud, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.*" (Emphasis supplied.)

Petitioner believes that the federal rule above quoted is applicable in this case. Congress expressly authorized the bringing of actions of this character by corporate stockholders in any judicial district where the injured corporation might have sued the same defendants. *Section 1401, Title 28, U. S. C.* To encourage such actions, Congress provided for extraterritorial service of process upon the injured corporation. *Section 1695, Title 28, U.*

S. C. This is not a case where there was a choice afforded to the plaintiff to sue in a state court or a federal court, as was *Guaranty Trust Co. v. York,* 326 U. S. 99. The only forum in which a stockholders' derivative action could be successfully maintained to recover for Crescent the stock here involved was in a court which could acquire jurisdiction of the *res* and Crescent. Action in the state courts in Georgia was precluded because Crescent, an indispensable party, could not be brought before Georgia courts without its consent, it never having done business in Georgia.

The statute of limitations did not begin to run until the discovery of the fraud in December 1941, under the stated federal rule, even though the complaint may be said to fail to allege any special circumstances or efforts on the part of respondents to conceal the fraud from Crescent.

LACHES.

Neither the court below nor the respondents cite a single authority to support the holding of the court below which bars, for laches, a stockholders' derivative action against persons who conspired with a majority of a corporation's directors to defraud it, while the injured corporation remains under the control of directors and stockholders whose interests, with respect to the enforcement of the corporation's claims against the wrongdoers for the fruits of the fraud, are antagonistic to the interest of the corporation.

This Court, in *United States v. Dunn*, 268 U. S. 121, at page 136, said:

> "One who claims the benefit derived from a breach of trust in which he actively participates, and who shows no prejudice from the delay in bringing suit to compel him to account, cannot complain of laches."

No prejudice from the delay in bringing this action was shown by the respondents. The deaths of three of their joint *tort feasors* does not show prejudice to respondents.

The decisions cited by the court below in support of its ruling sustaining the plea of laches (R. 200) are distinguishable upon their facts from the facts in this case. The statute of limitations had not run in this case, and this case involves fraud and concealment by fiduciaries. *Redmond v. Fruit Co.*, 185 F(2) 553, was a libel action, the statute of limitations had run, and there was no fiduciary relation; in *Anderson v. Gailey*, 33 F. (2) 589, 592, the statute of limitations had run after the wrongdoing directors had left the company and new directors had been elected, and the action was in the individual right of stockholders, not a derivative one; in *Citizens & Southern Bank v. Ellis*, 171 Ga. 717, the statute of limitations had run, all the parties to the transaction were dead or mentally deranged, and there was no charge of fraud or its concealment; in *Sutton v. Dyke*, 60 Ga. 449, the principal had a right to examine the books of his factor, but delayed doing so beyond the period of the statute of limitations; while here, Crescent was pre-

vented from making examination of the books of National and the books of the Voting Trustees and their agents, because Crescent was under the control of some of the joint *tort feasors*, who constituted a majority of its officers, and who were the only persons through whom Crescent could have access to said books; and, in *Middleton v. Pruden, supra,* there was no confidential relationship between the parties and the plaintiff could have detected the alleged misrepresentation by an examination of the *public* deed records.

MISREPRESENTATIONS BY RESPONDENTS AS TO BASIS OF CLAIMS STATED.

Respondents misrepresent to this Court that the complaint in this action demands relief with respect to an alleged agreement of July 27, 1928, which was attached to the complaint in the first *Tucker* case as "Exhibit C". This is not true. The respondents have not and can not point to any place in the complaint in this action or the exhibits thereto where said alleged agreement of July 27, 1928 is mentioned, or where any relief is demanded with respect thereto.

The respondents also misrepresent to this Court that the complaint in this action makes a collateral attack on the sale of Crescent's assets by the Louisiana Sheriff, and that certain parties to that transaction are absent here. They cite the first *Tucker* case, 92 F. Supp. 502, as authority for this proposition. Petitioner made such an attack in the first *Tucker* case, but not in this case.

The court below did not sustain the contention of respondents that the complaint in this action makes a collateral attack upon said Sheriff's sale of 1942.

BASIS OF CLAIMS HERE STATED.

The First Count of the complaint (R. 5-87) as amended (R. 167) states claims upon which relief may be had against respondents (except Southern), who are charged as joint *tort feasors* with the misappropriation of trust assets, consisting of 54,187 shares of the original common stock of National Linen Service Corporation, beneficially owned by Crescent, the legal title to which stock was held by seven voting trustees under the terms of the Voting Trust Agreement and the extension thereof, attached to the complaint as Exhibits "A" and "A-1". Said trust assets were misappropriated in 1928 pursuant to an unlawful conspiracy between said Voting Trustees and others to defraud Crescent of said stock and to conceal the fraud. Said First Count makes no attack, collateral or otherwise, upon the 1942 Sheriff's sale, nor does it demand any relief with respect thereto. It alleges that Crescent's claims against respondents for said stock were not seized and sold by the Sheriff in 1942, in that, said claims were not described in the Sheriff's seizure in such manner as to enable any person to identify said claims or estimate their value, and that Crescent has never been divested of the ownership of said claims. Said First Count recites the action of Crescent's directors after the discovery of the fraud in December 1941, leading up to the Sheriff's sale of July 9, 1942,

and thereafter (R. 33-73), for the purpose of showing that New Orleans Laundries, Inc., a Delaware corporation, which was owned by a majority of Crescent's directors and stockholders, pretended to purchase and take over the property owned by Crescent prior to said Sheriff's sale, so as to establish the fact that the interests of said majority directors and stockholders of Crescent are antagonistic to the interest of Crescent with respect to the enforcement of Crescent's claims against respondents, which fact entitles petitioner to sue in equity to enforce her corporation's claims against respondents. The First Count states claims against respondents upon which relief may be had. We feel that a discussion of the Second Count would be superfluous.

LOUISIANA DECISIONS CONTROL.

Respondents take no issue with petitioner's contention that Crescent could not have been deprived of the claims against them by the Sheriff's sale of 1942 under the decisions of Louisiana (cited at page 54 of our original brief), which require property sold at judicial sale to be described so as to enable a person to identify it and estimate its value. Respondents merely repeat that *Kohler v. McClellan,* 156 F. (2) 908, so holds. As we have heretofore pointed out, the decision and judgment in that case can not be an answer to the charges made against the respondent joint *tort feasors* in this action. *Bigelow v. Old Dominion C. Min. & S. Co., supra.*

ONE WHO AIDS TRUSTEES IN MISAPPROPRIATION ACCOUNTABLE THOUGH REAPING NO BENEFIT.

It is conceded by petitioner that the respondents Weinstein, Weinberg, and Jacobs received none of the diverted stock, but this is no defense. They were Voting Trustees for said stock and, as such, they illegally authorized the misappropriation of the 50,000 shares, by means of Voting Trust Certificates, to S. W. Souers and his nominees, with the knowledge that a majority of Crescent's directors were to be nominees of Souers to receive some of said 50,000 shares as secret profits for themselves, at Crescent's expense, pursuant to the conspiracy (R. 13).

The exculpatory provisions of the Voting Trust Agreement do not relieve said Voting Trustees for their individual wilful malfeasance in conspiring to defraud Crescent of said stock and to conceal the fraud.

In *Atlanta Trust Co. v. Nat'l Bondholders Corp.*, 186 Ga. 761, 769, the Supreme Court of Georgia held:

> "One who aids and assists a trustee in misapplying trust funds, with knowledge of his misconduct, is directly accountable to the person injured by such misapplication, although the person thus assisting the trustee does not himself reap the fruits of the misappropriation."

ACTION AS TO SOUERS ONE IN REM.

The brief of respondents Sidney W. Souers, et al., (p. 10) misrepresents to this Court that in *Jellinik v. Huron Copper Min. Co.,* 177 U. S. 1, the plaintiffs had the title to the stock and held uncancelled certificates therefor. The truth is that certificates for most of the stock were held by the non-resident defendants. The plaintiffs alleged (p. 10): "that they were the equitable owners of that stock, although the legal title was in certain of the defendants." The non-resident defendant Watson held 38,315 shares. In that case, as in this one, plaintiffs sought the cancellation of the *registrations* of the shares of stock on the *books of the company,* as clouds upon the title of the lawful owners of the stock. Here (R. 79) (g. R. 84), we seek to compel National Linen Service Corporation to cancel the stock standing in the name of S. W. Souers *on its books.* The action is clearly *in rem* as to Souers, since it does not seek to compel Souers to do anything and does not seek a personal judgment against him. The only decree sought is one affecting Souers' interest in the *res,* and the action as to him may be supported by substituted service. *Section 1655, Title 28, U. S. C.*

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